93-741

No.

Supreme Court, U.S.
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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1993

THADDEUS KOSTRUBALA, M.D.
*Petitioner,*
v.
ESTATE OF CONNERS, HOWARD MEREDITH, et al.
*Respondents.*

**On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Does a voluntarily-committed patient at a State mental hospital have a Federal constitutional due process right to adequate security, as opposed to rights protected under state tort law?

2. For purposes of § 1983 liability, can a State hospital administrator be deemed the proximate cause of one patient's killing of another patient, premised solely upon the administrator's failure to investigate and intervene to prevent the assault?

3. Is summary reversal of the Ninth Circuit's decision on attorney's fees warranted, given its substitution of an any -"substantial" result standard for the comparative test of fee reasonableness mandated by this Court's opinion in *Farrar v. Hobby*, 121 L.Ed.2d 505 (1993)?

## LIST OF PARTIES

Petitioner: Thaddeus Kostrubala, M.D.
Respondents: Estate of Conners, Howard Meredith, Lillian Beatty.

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**PETITION FOR WRIT OF CERTIORARI**

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## OPINION BELOW

The relevant decision of the United States Court of Appeals for the Ninth Circuit was not reported, and is set forth at Appendix A-1 to A-16.

## JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on October 4, 1993. A petition for writ of certiorari is due on or before December 3, 1993.

This Court has jurisdiction to review the lower decision by writ of certiorari under 28 U.S.C. § 1254(3).

## APPLICABLE FEDERAL LAWS

1. United States Constitution, fourteenth amendment, section 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

2. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

3. 42 U.S.C. § 1988:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

## STATEMENT OF THE CASE

### 1. Nature of this Controversy.

This civil rights action under 42 U.S.C. § 1983 arises from the death of a mental patient at Napa State Hospital ("NSH"), a California State mental hospital. In April of 1985, the decedent, Ms. Conners, was murdered by another patient at NSH, one John Duncan. It is indisputable that, at the time of her death, Ms. Conners was a voluntary patient at NSH - having been placed there by her conservator, with the consent of the parents.

Ms. Conners' parents commenced this action in 1986.[1/] They sued none of the NSH physicians or staff who were directly responsible for the care and treatment of their decedent or the assailant. Instead, the respondents named as defendants the Director of the California Department of Mental Health, Dr. Michael O'Connor, as well as the top administrators at the hospital - including petitioner Thaddeus Kostrubala, the Medical Director; Fred Valenzuela, the Executive Director; and Stephen Donoviel, Clinical Director.

As summarized by the lower court, the case against the defendant hospital administrators focused upon the assailant-patient's receipt of a "P-card," in March of 1985, which conferred upon Duncan the privilege of moving about on the hospital grounds. (Appendix at A-4). The theory of respondents' case was that, without a P-card, Duncan could not have wandered the NSH grounds unsupervised, and thus, the issuance of the P-card to Duncan a month prior to the assault was the "cause" of the murder of respondents' decedent, NSH patient Conners. (Appendix at A-5).

In the ensuing five years of litigation, respondents' attorneys spared no expense, and left no rock unturned in their pursuit of discovery and pretrial proceedings against the four hospital administrator defendants. However, following a jury trial that lasted less than one week,

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1. At the same time, respondents initiated a "back-up" action against the same defendants in State court, asserting the same facts as alleged in this federal action, but premising recovery solely upon a state tort law theory - of negligence.

plaintiffs-respondents were able to obtain a verdict only of $281,000, an amount only slightly better than the combined defendants' pretrial settlement offer. Of the four defendants, the verdict only found two liable, Drs. O'Connor[2/] and Kostrubala, petitioner herein.

Respondents' success was clearly very limited, especially when a comparison of the amounts sought in the litigation are compared with the final recovery. Their counsel requested the jury to award compensatory damages of $600,000, plus correspondingly-large amount of punitive damages allegedly needed to "send a message." The verdict, however, contained no punitive damage award; and the amount of the award was less than half of the amount of the compensatory damage which had been sought.

Despite their limited success at trial, and their prevailing on the merits only as to one of the four defendants, respondents' counsel submitted a fee request of $375,000. According to respondents' fee request, their counsel had expended *forty* full weeks of pretrial work in preparation for the one week trial.[3/] On its face, the fee award was excessive: although no relief except damages had ever been sought, the fees awarded were more than 120% of the verdict. The amount was more than three times the amount respondents' counsel had agreed to accept in their 40% contingent fee agreement with

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2. The verdict against Dr. O'Connor was reversed by the Ninth Circuit. Appendix, at A-6 to A-9.

3. This figure excludes the time respondents' counsel spent on prior appellate work.

respondents.

## 2. Proceedings Below.

In his post-trial motions to set aside the verdict and judgment, petitioner Dr. Kostrubala argued that his failure to investigate or intervene in Duncan's case was not the proximate cause of the subsequent attack, and the death of respondent's decedent. Duncan had obtained grounds privileges upon the recommendation and approval of his treating physician and treatment team, in compliance with the hospital's policy. Although Dr. Kostrubala had, as Medical Director of the hospital, the authority to intervene in these professionals' treatment decision, there was no evidence presented to establish that if, in fact, Dr. Kostrubala had intervened, the assailant's grounds privileges would have been revoked.[4/] The district court, however, denied petitioner's motions for judgment N.O.V. and for a new trial, on the grounds that petitioner, as Medical Director, had the authority to investigate and intervene to revoke Duncan's P-card, but had failed to do so.

The Ninth Circuit affirmed liability as to petitioner Dr. Kostrubala only, but reversed the verdict as to Dr. O'Connor - on proximate cause grounds. (Appendix at A-5, A-8). The Court of Appeals found

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4. Indeed, the only testimony on point, from Duncan's psychiatrist, Dr. Sikand, established that in March of 1985, the treatment team diagnosed Duncan as doing well in treatment, and for that reason, found grounds privileges appropriate.

that Dr. Kostrubala's nonfeasance, in failing to investigate and intervene somehow "caused" the murder of respondents' decedent in April 1985, a month after the assailant was granted grounds privileges by his treating psychiatrist. (Appendix at A-5).

**3. Reasons for Granting of this Petition.**

The result below, in affirming liability as to petitioner, was clearly erroneous, and contrary to well-established precedent of this Court. There was no factual dispute as to the decedent's status as a voluntary patient at the hospital. However, the lower court refused to even consider this legal issue which was a predicate to any § 1983 liability, i.e., whether a voluntary patient has any due process right to safety, after *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). There is a conflict below in the circuit Courts of Appeal, and resolution by the Court is necessary to resolve this important issue, which at its core, concerns the basic structure of Federalism: should a duty to protect under state tort law be converted into a § 1983 duty to protect simply because the state offers voluntary treatment to a mental patient?

Secondly, by allowing a supervisory-level hospital administrator to be held liable for nonfeasance, and imposing liability for errors in professional judgment at a lower level, the Ninth Circuit has adopted an expansive doctrine of proximate cause under § 1983 which cannot be squared with the earlier pronouncements of this Court, most notably in *Martinez v. California*, 444 U.S. 277 (1980)

and *Rizzo v. Goode*, 423 U.S. 362 (1976). Apparently, given the lower court's decision in this case, a further clarification of the issue is needed.

Finally, granting of this petition is necessary so that this Court may exercise its supervisory powers to correct the lower court's failure to heed the attorney's fee award standard of reasonableness set forth by the Court in the recent decision in *Farrar v. Hobby*. The lower courts should not, in the guise of "distinguishing" this Court's rulings, be allowed to substitute rules of law contrary to those announced by this Court.

## ARGUMENT

### I

### REVIEW OF THIS CASE IS NEEDED TO RESOLVE AN IMPORTANT AND HERETOFORE UNRESOLVED ISSUE - WHETHER THE STATES HAVE A CONSTITUTIONAL DUTY TO PROTECT VOLUNTARY PATIENTS AT INSTITUTIONS

In *Youngberg v. Romeo*, 457 U.S. 307, 324, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982), this Court held that a mental patient involuntarily committed to a state hospital enjoyed "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." On the other hand, in *DeShaney v. Winnebago County Department of Social*

*Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Court held that county officials did not violate a young boy's due process rights when, in spite of repeated warnings, they failed to take action to protect the boy from beatings by his father.

In *DeShaney*, the Court held that the county officials had not violated the boy's substantive due process rights because "the [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." 489 U.S. at 195.

The Court noted that *Youngberg* and other cases had recognized that the State has "in certain limited circumstances . . . affirmative [constitutional] duties of care and protection with respect to particular individuals." Id. at 198. The Court distinguished those cases, however, because "they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being [citations omitted] . . . . It is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause . . . ." Id. at 199-200 (emphasis added).

Since *DeShaney*, a number of circuits, district courts and state courts have reached differing results when considering whether voluntary patients at state mental institutions are protected by a constitutional substantive due process right to safety. *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989); *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984), cert. denied, 107 L.Ed.2d 835 (1990); *Ridler v. Four County Counseling Center*, 809 F.Supp. 1343 (N.D. Ind. 1992); *Jordan v. State of Tenn.*, 738 F.Supp. 258 (M.D. Tenn. 1990); *Williams v. Hartman*, 597 N.Ed.2d 1024 (Mass. Sup. Ct. 1992).

For example, in the leading case of *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992), the First Circuit held that a voluntary mental health patient who was injured while in the custody of a State facility did not have a substantive due process right to protection, although the patient might have a right protected under state tort law. The *Monahan* court persuasively reasoned that, under *DeShaney*:

> "Because the state did not commit Monahan involuntarily, it did not take an affirmative act of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection." 961 F.2d at 991.

Simply stated, petitioner contends that the State does not owe a constitutional right to safe conditions to all persons on state property or who are cared for by state employees. A different construction is inconsistent with the very premise of the Due Process clause, which does not impose an affirmative duty upon the States to protect their citizens. Rather, it serves as a limitation on the States' power to act. *DeShaney*, 489 U.S. at 195.

The importance of the determination of this issue can hardly be understated, given the existence of large numbers of voluntarily-admitted patients present not only in the State of California's mental institutions, but in those of the several States nationwide.

Moreover, should voluntary mental hospital patients be accorded due process rights to safety, enforceable in the federal courts pursuant to 42 U.S.C. § 1983, there would seem to be no reasoned basis for excluding from constitutional litigation injuries which may occur during the many other types of custodial relationships States and local governments are involved in, in this day and age. School children, foster children, and many other categories of voluntary wards may likewise claim protection, under the aegis of the Constitution, for tort-type injuries more properly addressed in the state courts.

## II

## THE CONCLUSION THAT PETITIONER'S INACTION CONSTITUTED A DUE PROCESS DEPRIVATION CANNOT BE SQUARED WITH THIS COURT'S PROXIMATE CAUSE ANALYSIS IN *MARTINEZ v. CALIFORNIA*

As the Ninth Circuit alluded to in its unpublished opinion on the merits, petitioner Dr. Kostrubala, as Medical Director of a 1500-patient state mental hospital, was not held liable for affirmative misconduct. Duncan, the patient who committed the assault on respondents' decedent, had obtained grounds privileges a month prior to the death from his treating psychiatrists, and treatment team. (Appendix at A-4).

It was undisputed that petitioner had no role in approving the grant of grounds privileges in March of 1985.[5/] Rather, Dr. Kostrubala was held liable for inaction -nonfeasance- for failing to investigate and intervene, when he learned that the assailant had obtained

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5. None of the members of the assailant's treatment team - i.e., the psychiatrist, nurses and staff who were responsible for evaluating and granting Duncan grounds privilege, were ever sued. No finding was ever made that the persons who actually evaluated Duncan and granted grounds privileges, did so in the absence of professional judgment, in violation of *Youngberg v. Romeo*, 457 U.S. 307 (1982).

grounds privileges from his treatment team.[6] No evidence was relied upon by the Ninth Circuit, as none had been presented at trial, which proved that if petitioner had investigated, the assailant's grounds privileges would necessarily have been revoked.

This conclusion, that petitioner's intervention would have prevented the harm was pure speculation, insufficient to have supported a finding of proximate cause, even applying state tort law principles. *Whitcombe v. Yolo County* (1977) 73 Cal.App.3d 698 (probation officer's failure to investigate probationer to ascertain danger not proximate cause of probationer's assault on third person - even if investigation had taken place, no guarantee that revocation would occur); *Brenneman v. State* (1989) 208 Cal.App.3d 812 (parole officer's failure to investigate parolee's status not proximate cause of parolee's murder, as subsequent revocation was discretionary); *State v. Superior Court (Perry)* (1984) 150 Cal.App.3d 848 (same).[7]

It is axiomatic even in tort law that a defendant cannot be held liable for an injury unless it can be

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6. Ironically, the Ninth Circuit recognized that the only affirmative action Dr. Kostrubala took, as Medical Director, was in December of 1984, six months before the assault, when he approved the *revocation* of the assailant's grounds privileges, for 90 days. (Appendix at A-4).

7. To the extent that tort law concepts of proximate cause are incorporated into § 1983, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), this Court cautioned in *Martinez* that even if proximate cause is present, for purposes of tort law, an actionable deprivation of Constitutional magnitude may be absent. See pp. 14-15, infra.

concluded that the injury would not have occurred but for the conduct of the defendant. 1 Harper, James & Gray, *Law of Torts*, § 20.2, at 91-92 (2d ed. 1986). As a subsidiary result of this rule, courts have held an official's nonfeasance not to be the proximate cause of an injury unless, as a matter of reasonable certainty, it could be concluded that the official's action would necessarily have prevented the harm.

In this case, even if petitioner had intervened, there was no guarantee that he would have overridden the judgment of the assailant's treatment team, and have revoked Duncan's grounds privileges. It is, likewise, pure speculation to conclude that, even if the grounds privileges of the assailant had been revoked in March of 1985, the revocation would still have been in effect in April of 1985 (or later), so as to have removed forever the threat of any potential assault by Duncan.

By allowing liability to be imposed in the circumstances of this case, the Ninth Circuit has adopted an expansive view of proximate cause for purposes of § 1983 liability which simply cannot be squared with this Court's decision in *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, plaintiffs alleged that a parole board erred in granting parole (i.e., off-grounds privileges) to one who later killed the plaintiffs' decedent.

In holding that the board's grant of parole was not a constitutional deprivation, this Court noted that:

> "Regardless of whether, as a matter of state tort law, the parole board could be said either to have a 'duty' to avoid harm to the victim or to have proximately

> caused her death, [citations] we hold that . . . . [defendants] did not 'deprive' [the] decedent of life within the meaning of the Fourteenth Amendment."

444 U.S. at 285.

If the action in *Martinez* of the defendant parole board members in granting parole to the assailant was too remote to be sufficient to support a federal claim, surely the inaction of petitioner here cannot reasonably be deemed to be a "deprivation". The lower court's conclusion that petitioner's inaction was sufficient to "deprive" respondents' decedent of due process is fundamentally inconsistent with this Court's due process jurisprudence, which has consistently recognized the principle that it is error to equate tort law wrongs with violations of the Due Process Clause. *Baker v. McCollan*, 443 U.S. 137 (1979). At this Court stated in *Baker v. McCollan*:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law theories."

443 U.S. at 146 n. 15.

Even assuming that, as a voluntary patient, respondents' decedent in this case had a federal substantive right to be protected, that right clearly was not implicated unless it could be concluded that the State, qua state, inflicted the harm. That is so because the

Fourteenth Amendment protects only against deprivations by the "State . . . of life . . . without due process of law." Because, in this case, the petitioner's inaction was only a "remote" circumstance in the causal chain, the lower court's holding must be reversed.

## III

## THE DECISION OF THE NINTH CIRCUIT ON FEES IS FUNDAMENTALLY INCONSISTENT WITH THE DECISION OF THIS COURT IN *FARRAR v. HOBBY*

In holding that the respondents were entitled to a full attorney's fee award, despite their extremely limited success, the court below misread or ignored the rule of law only recently reaffirmed by this Court in its decision in *Farrar v. Hobby*, 506 U.S. _____, 121 L.Ed.2d 494 (1992).[8/] In *Farrar*, this Court reaffirmed and clarified its requirement that the reasonableness of a fee award is to be gauged by a comparison between the relief sought by the plaintiffs, and the recovery actually obtained.

As the Court stated forthrightly:

> "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to

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8. No error in this regard may be attributed to the district court, which entered its decision on fees prior to the decision in *Farrar v. Hobby*. Indeed, the district court found respondents to have "padded" their fees.

> the amount of damages awarded as compared to the amount sought."

121 L.Ed.2d at 505, quoting *Riverside v. Rivera*, 477 U.S. 561, 585 (1986).

This Court mandated a comparison between the relief sought, and that obtained in a civil rights lawsuit because "if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended . . . times a reasonable hourly rate [i.e., the "lodestar"] may be an excessive amount." Id. quoting *Hensley v. Eckerhardt*, 461 U.S. 424, 436 (1983).

In this case, however, the lower court, while giving lip-service to *Farrar v. Hobby*, substituted an inherently different test. Eschewing any comparative analysis of the degree of success, the Ninth Circuit instead applied an any "substantial" result test: i.e., so long as a plaintiff gains a damage verdict which is "substantial," it will be upheld, without reference to the degree of success the award represents. (Appendix at A-15).

This Court may read for itself the lower court's decision, which essentially converted this Court's test in *Farrar v. Hobby* into a de minimus recovery test, stating that this Court's opinion was "distinguishable" under the facts. (Appendix, at A-15 to A-16). If the lower court's opinion and decision is allowed to stand, this will allow that court, by a process of strained judicial interpretation, to substitute its own less-stringent standard of reasonableness, in derogation of the test set forth by this Court in *Farrar v. Hobby*.

Had the court below properly utilized the comparison test of *Farrar v. Hobby*, it would have been

compelled to have reversed the district court's fee award.

As Chief Justice Rehnquist aptly observed in his dissent from the plurality opinion in *Riverside v. Rivera*, 477 U.S. 561, 593 (1986), the lower courts cannot "suspend their disbelief" when determining reasonable fees under § 1988:

> "One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages." 477 U.S. at 595.

Justice Rehnquist further stated, in exemplifying this point:

> "If A has a claim for contract damages in the amount of $10,000 against B, and retains an attorney to prosecute the claim, it would be both extraordinary and unjustifiable, in the absence of any special arrangement, for the attorney to put in 200 hours on the case and send the client a bill for $25,000. Such a bill would be 'unreasonable,' regardless of whether A obtained a judgment against B for $10,000 or obtained a take-nothing judgment."

477 U.S. at 593.

Because a civil rights plaintiff, unlike a usual paying client, has no incentive to monitor his attorney's hours, it is crucial that the lower courts do not uncritically enter full fee awards without engaging in the comparative analysis mandated by the Court in *Farrar v. Hobby*. The Court's approach, if it would have been followed, would have prevented the windfall award entered in this case:

> "[N]o client, however wealthy, would pay a lawyer more than a dollar to pursue a dollar's worth of recovery . . ." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

It is incomprehensible that the lower court, acting so shortly after this Court's decision in *Farrar v. Hobby*, could authorize an award so obviously inconsistent with the rule of fee reasonableness announced therein. In the exercise of its supervisory authority over that court, this Court should summarily reverse the lower court's fee decision, ordering it to remand the fee issue to the district court for a redetermination of the fees, consistent with this Court's *Farrar v. Hobby* decision.

## CONCLUSION

For all of the above-stated reasons, the decision and judgment of the Ninth Circuit should be reversed.

DATED: November 1, 1993

Respectfully submitted,

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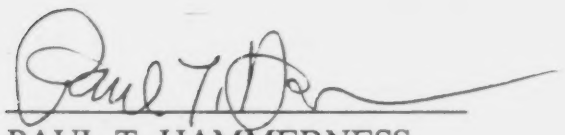

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